

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORBITAL PUBLISHING GROUP INC,

Plaintiff

DOCKET NO.: CV-11-3065 (PAC)
New York, New York
May 10, 2011

BANK OF AMERICA N.A.,

Defendant

x

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE

BEFORE THE HONORABLE PAUL A. CROTTY
UNITED STATES DISTRICT JUDGE

15 A P P E A R A N C E S:

16 For the Plaintiff: DAVID P. LENNON, ESQ.
17 Lennon & Klein P.C.
18 410 Park Avenue, 15th Floor
19 New York, NY 10022

20 For the Defendant: DAVID B. CHENKIN, ESQ.
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1 THE CLERK: Your Honor, this is the matter of Orbital
2 Publishing Group Inc v. Bank of America N.A., docket number
3 eleven civil three zero six five.

4 Counsel for plaintiff, please state your appearance.

5 MR. LENNON: Good morning, Your Honor. David Lennon,
6 of Lennon & Klein, --

7 THE COURT: Okay, Mr. Lennon.

8 MR. LENNON: -- for plaintiff Orbital Publishing
9 Group.

10 THE COURT: All right.

11 THE CLERK: For defendant?

12 MR. CHENKIN: Good morning, Your Honor. David
13 Chenkin, from Zeichner Ellman & Krause LLP, for Bank of
14 America, and I'm here with my partner Jantra Van Roy of our
15 firm.

16 THE COURT: Okay.

17 MR. CHENKIN: Thank you.

18 THE COURT: Mr. Lennon, have you seen the affidavit
19 declaration of Ms. Virginia Prieto [phonetic]?

20 MR. LENNON: Yes, Your Honor. It was handed to me
21 ten minutes ago.

22 THE COURT: Okay. What do you have to say?

23 MR. LENNON: Other than it's -- I mean, it doesn't
24 say any justification for withholding the money.

25 THE COURT: Right.

1 MR. LENNON: I mean, that -- I could go through it,
2 Your Honor, and point out all of its deficiencies.

3 THE COURT: Well, you've had it for ten minutes,
4 which is exactly ten minutes longer than I've had it, so why
5 don't you give me the benefit of your insight?

6 MR. LENNON: Well, they say two things. They say
7 they received an undisclosed number of returned checks, and
8 that my client Orbital was depositing checks that were endorsed
9 by Orbital but payable to another -- payable to a magazine.
10 That's completely proper. We don't dispute that that happens
11 from time to time.

12 Orbital Publishing is an independent magazine
13 subscription company. They send out thousands of magazine
14 solicitations to their customers for hundreds of different
15 magazines. Sometimes customers -- even though they're
16 instructed on the mail piece to make the check payable to
17 Orbital or one of its DBAs, sometimes the customer will make
18 the check payable to Time Magazine or the Wall Street Journal
19 or Fortune, or whatever magazine that they're buying. Under
20 the UCC that's a totally proper endorsement, and those checks
21 were deposited and have been cleared.

22 Now, according to the affidavit, some of those checks
23 have been returned and have been charged back to Orbital's
24 account, and that's happened over the past and we know that.
25 But all those checks have been covered by Orbital. They don't

1 talk about how much money there is or how many chargebacks
2 there are. We don't know if it's five or fifty. But either
3 way, Orbital has always honored its chargeback commitments to
4 Bank of America.

5 So I don't even -- I don't know what -- again, I
6 don't know what we're talking about. The affidavit states that
7 Orbital has deposited over thirteen million dollars to its Bank
8 of America account but they don't indicate how many chargebacks
9 there have been.

10 They also found some references on the internet that
11 Orbital is not authorized to solicit certain magazines and any
12 solicitations for those magazines should be considered
13 fraudulent. Those allegations against magazine subscription
14 agents, Your Honor, happen all the time. I don't know if my
15 client's even soliciting --

16 THE COURT: Do you want to continue business dealing
17 with Bank of America?

18 MR. LENNON: No, Your Honor. We just want our money
19 back.

20 THE COURT: Okay.

21 Mr. Chenkin?

22 MR. CHENKIN: Thank you, Your Honor. I'd like to
23 address two things that Mr. Lennon said. First of all, in
24 terms of an endorsement being appropriate under the UCC -- if I
25 may, let me just start with a caveat. I know you saw my

1 partner Steve Ellman yesterday. We just got involved in this
2 recently. I don't have all the facts, so I just want to be
3 careful about what I state as being a fact and what I've
4 learned.

5 In terms of the -- I -- as far as I know, the bank is
6 not aware --

7 THE COURT: No, what I'd like to know --

8 MR. CHENKIN: Sure.

9 THE COURT: -- and I know you've been on a short
10 notice here --

11 MR. CHENKIN: yeah.

12 THE COURT: -- is in what -- under what color of
13 authority does the bank impose a complete block on this and
14 then not -- and not deal with the banking customer? It's the
15 bank's -- it's not the bank's money, right? It's the
16 customer's money.

17 MR. CHENKIN: Well, yes --

18 THE COURT: The bank --

19 MR. CHENKIN: -- and no, Your --

20 THE COURT: The bank owes the money to the customer
21 subject to certain terms and conditions in the deposit
22 agreement.

23 MR. CHENKIN: Correct.

24 THE COURT: We all understand that.

25 MR. CHENKIN: That's right.

1 THE COURT: But part of it, at least in my experience
2 -- maybe limited -- is that when the bank does something, it
3 tells its customer. Here, you've done none of that.

4 MR. CHENKIN: Yes. And, Your Honor, one of the
5 things that I am hoping to be able, if Your Honor wishes, to
6 supplement our production with is the appropriate account
7 agreement governing this account. I believe that pursuant to
8 that account agreement either the bank or the customer can
9 terminate the relationship at any time. The bank is not
10 required to give a reason to the customer. And if there's a
11 suspicion of --

12 THE COURT: Excuse me. The bank is able to --

13 MR. CHENKIN: Is not required to give a reason to the
14 customer.

15 THE COURT: But how can they hold onto the money if
16 they don't give a reason to the customer?

17 MR. CHENKIN: Part of that agreement also provides --
18 and I will provide it to the Court as soon as I have it. Part
19 of that agreement also provides that if there is a suspicion of
20 fraudulent or some type of --

21 THE COURT: Yeah.

22 MR. CHENKIN: -- similar type of activity that the
23 bank is within its rights to freeze the account for a period of
24 time until it has the time to make a reasonable investigation.

25 THE COURT: Well, you've froze it now for three

1 weeks.

2 MR. CHENKIN: I believe it's approximately three
3 weeks.

4 THE COURT: Well, April 14th right now is --

5 MR. CHENKIN: Three weeks.

6 THE COURT: Do we agree it's --

7 MR. CHENKIN: Granted.

8 THE COURT: -- more than three weeks?

9 MR. CHENKIN: Granted.

10 THE COURT: So I think that unless you give the money
11 back, Mr. Chenkin, by -- I'll give you a couple of days. I'll
12 give you till Friday the 13th to give the money back and to
13 identify whatever amounts you want to withhold and justify
14 that. But there's no reason for you to hold onto money in
15 light of what you're saying. Give it back.

16 I mean, if you want to withhold a portion -- I mean,
17 if Mr. Lennon wants to post a bond or give you a certified
18 check to guarantee that, I'm going to direct that you return
19 the entire amount on deposit. You know, if there's -- if
20 you've got an exposure here, I'll ask Mr. Lennon to cover that
21 exposure with a security deposit. But you've got to give the
22 money back.

23 MR. CHENKIN: Your Honor, we're in agreement with
24 that, and although it's an ominous date, Friday would be
25 acceptable. If I may just explain what the exposure is in

1 connection with posting this security, --

2 THE COURT: Yes.

3 MR. CHENKIN: -- because we don't object to returning
4 the funds as long as there is sufficient security for the
5 exposure.

6 THE COURT: Yeah.

7 MR. CHENKIN: In terms of these checks -- and I did
8 read Mr. Lennon's papers. My -- with all due respect, I think
9 they focused on the wrong thing. Just because checks had been
10 deposited a time ago -- these accounts have been open since, I
11 believe, last October. And just because checks were deposited
12 a time ago and a small amount of them, according to the
13 plaintiff, have been returned as bad or insufficient funds,
14 that's not the bank's real exposure here.

15 The bank's exposure here is the chargebacks that are
16 reflected on the account statements that are attached to
17 plaintiff's papers. So if a person sends a check to plaintiff,
18 and if it turns out that the plaintiff did not have the
19 authority to act on behalf of, say, the Wall Street Journal,
20 and if I thought I was extending my subscription with the Wall
21 Street Journal, and I sent the plaintiff a check, the Wall
22 Street Journal cancels my subscription and says we don't have
23 any relationship with the plaintiff, that's not us, I go back
24 to my bank and I look at that check and I see that it's made
25 payable to the Wall Street Journal but it's not endorsed by the

1 Wall Street Journal, it's endorsed by the plaintiff and it was
2 deposited to the plaintiff's Bank of America account, and I go
3 back to my bank and I make a claim on the drawee bank to say
4 that you should not have paid that check, and it would be
5 correct under the UCC, and the drawee bank has to reimburse the
6 customer, and the drawee bank has a claim against Bank of
7 America because Bank of America was the depositary bank --

8 THE COURT: How many times has that happened in the
9 last eight months?

10 MR. CHENKIN: I cannot swear to it, but I spoke with
11 someone this morning who said that the number of checks that
12 have been returned so far under that scenario is approximately
13 six hundred, which is a lot of checks. The dollar amount,
14 because each one of these checks apparently is for a magazine
15 subscription -- you know, which are not thousands and thousands
16 of dollars. The dollar amount -- I'm getting -- and I could
17 supplement the papers, but there's no question that the dollar
18 amount is small compared to the thirteen million dollars that
19 had gone through the account since October.

20 But that's really the concern, Judge, because the
21 concern is people aren't finding out about the fact that their
22 subscriptions really aren't being extended for a long period of
23 time, because often you would extend your subscription a couple
24 of months before it expires, and then you find out three months
25 later that you're not getting your Wall Street Journal, and you

1 do some investigation, and you see that you have a check that
2 you wrote in last November, that's not good, and you make a
3 claim against your bank --

4 THE COURT: Could you tell me one thing, Mr. Chenkin?

5 With all due respect to your argument, --

6 MR. CHENKIN: Yes.

7 THE COURT: -- why don't you tell that to Orbital?

8 Not you.

9 MR. CHENKIN: I understand that.

10 THE COURT: Not you. You just got involved. But why
11 doesn't your bank that you so ably represent tell that to the
12 customer?

13 MR. CHENKIN: Judge, with all due respect, the bank
14 is at the very beginning stages of what they believe is a
15 potentially serious fraud investigation. It is customary for
16 the bank to not have that type of conversation with anybody,
17 number one.

18 Number two, --

19 THE COURT: They withhold their funds for three
20 months -- or, excuse me, three weeks and don't give them any
21 explanation at all?

22 MR. CHENKIN: Well, --

23 THE COURT: Won't even answer their phone call?

24 MR. CHENKIN: Number two, Your Honor, I believe --

25 and again, Mr. Lennon was there. I wasn't. I grant him that.

1 I believe there was an issue with the authority of counsel to
2 discuss the bank account with the bank. The bank has --

3 THE COURT: Oh, please.

4 MR. CHENKIN: I know you're laughing, but listen.

5 THE COURT: Please. You know, the bank is now asking
6 for Mr. Lennon's bona fides?

7 MR. CHENKIN: No, no, no, no. If I may for one
8 second, Your Honor, --

9 THE COURT: Yeah.

10 MR. CHENKIN: -- part of the fraud investigation is
11 the following. There were two authorized signers on the
12 account. One was an officer of the company and one was one of
13 the bookkeepers who signed one of the declarations here. The
14 bank had found out, I believe very recently, that the officer
15 of the company passed away in February. So the only authorized
16 signer on the account, the only person authorized --

17 THE COURT: Is the bookkeeper.

18 MR. CHENKIN: -- to speak with the bank, is the
19 bookkeeper. And I believe that there was an issue with
20 obtaining authority from the bookkeeper for the bank to discuss
21 the accounts with someone outside of the company, which is the
22 counsel. I wasn't there. I'm not making an excuse. All I'm
23 saying is that I believe that there may be issues there that
24 aren't simply a stonewall by the bank.

25 THE COURT: Okay.

1 MR. CHENKIN: And to bring it back to just the last
2 point that I wanted to make, if I may, Your Honor, the claims
3 that can be made by the drawers of the checks against Bank of
4 America -- that has a very long tail. Those claims in New York
5 State could be made for six years under the UCC and, under the
6 UCC that's adopted by the enlightened rest of the country,
7 usually three years.

8 So there could be a situation where the bank -- I'm
9 not saying all thirteen million, but there is a potential for
10 those checks -- particularly given the internet research that
11 the bank had done and the -- and the fraud concern, there is a
12 potential that we could have a tail here whereby checks that
13 get charged back to Bank of America that Bank of America has
14 already given credit to the plaintiffs for could far exceed the
15 four hundred thousand dollars that remains in the account right
16 now, which is one of the reasons that we respectfully request
17 that if the -- if the Court is going to issue a TRO, require
18 the bank to return the funds, that the bank has equal security
19 in the amount of the funds that are currently on deposit,
20 because I fear that I may be standing here six months from now
21 saying Judge, we're now up to over a million dollars in
22 chargebacks, and we don't know where it's going to end.

23 We just don't know. It's too soon in the process.
24 And plaintiff would ultimately be liable to the bank for every
25 dollar of checks that are charged back. And being a UCC

1 lawyer, my real concern is if they have a check that's payable
2 to Redbook or the Wall Street Journal, and they don't have an
3 endorsement from that entity, and they're just stamping their
4 name on the back and depositing it, and they have no agreement
5 with that entity to endorse in their name or endorse without
6 their name, Bank of America is going to be stuck for every one
7 of those checks. Thank you.

8 THE COURT: And in the -- you can't tell me of the
9 thirteen --

10 MR. CHENKIN: Approximately thirteen million in
11 credits from --

12 THE COURT: -- thirteen million two hundred and
13 ninety-five thousand dollars which has transited this account
14 from October through April --

15 MR. CHENKIN: Right.

16 THE COURT: -- October of 2010 through April of --

17 MR. CHENKIN: Correct.

18 THE COURT: -- April 14th of 2011 --

19 MR. CHENKIN: Yes.

20 THE COURT: -- some thirteen million dollars, you've
21 had six hundred claims?

22 MR. CHENKIN: Six -- approximately six hundred checks
23 that have come back so far, and the amount is a small amount.

24 THE COURT: So far for insufficient funds, or for --

25 MR. CHENKIN: No, I --

1 THE COURT: -- for claims --

2 MR. CHENKIN: I believe that they -- I believe that
3 all or most of them -- and I could confirm it; it's just I've
4 been in this for a couple of hours -- were returned because the
5 endorsement of plaintiff on the check was not the payee that
6 the check was made payable to.

7 THE COURT: Okay.

8 MR. CHENKIN: So it's as if there was a check payable
9 to you, Your Honor, and I took it, somehow I got it from you,
10 and I put my own endorsement on it, David Chenkin, and I
11 deposited it to my account. There is no endorsement from you.
12 I don't have any authority from my bank that says that the name
13 David Chenkin is -- suffices for the name of Judge Crotty, and
14 I put it in my account.

15 I can tell you that the drawer of that check can go
16 back to his or her bank and be reimbursed for the amount of
17 that check if it turns out that it really was without
18 authority, and that's the real concern here. And the real
19 concern is --

20 THE COURT: And do you --

21 MR. CHENKIN: -- that there's a lot of those.

22 THE COURT: Do you know, Mr. Chenkin -- and maybe you
23 don't know, so if you don't, you'll tell me that -- what the
24 average amount is of the checks that are in this group of six
25 hundred? Is it fifty dollars? Is it a hundred dollars?

1 MR. CHENKIN: Judge, I honestly don't know. I spoke
2 to someone -- you could see the affidavit of some fraud
3 investigator in California. She was in her office at five
4 thirty this morning. Those are her regular hours, by the way.
5 But in order to get the information for this stuff, Ms. Van Roy
6 and I have been working on this largely through the night, and
7 -- but I just don't know the average dollar amount.

8 I can tell you, Your Honor, that although I don't
9 have it for sure, I believe that the total amount of the
10 chargebacks, if you look at the accounts, today are probably
11 less than fifty thousand dollars. But the point is that it
12 takes a long time -- this account's only open since last
13 October.

14 It takes a long time for David Chenkin, whose
15 magazine -- subscribing in three months, who sends the check
16 in, to finally figure out at the back end that I got hoodwinked
17 and I'm not getting my subscription, to go back to my bank. I
18 would have -- in New York I could have six years to go back to
19 the bank on a forged endorsement.

20 THE COURT: Okay.

21 Mr. Lennon?

22 MR. LENNON: One point of law I need to, I think,
23 correct Mr. Chenkin on. Six years for a check is for
24 conversion. That's not the claim here. The claim here is for
25 an improperly endorsed check made payable to a particular

1 payee.

2 There's no allegation that the clients or the
3 customers of Orbital that sent the checks to Orbital had a
4 solicitation that said buy this magazine from us, pay the check
5 to us, and we'll get you the magazine. And that's what
6 happened.

7 THE COURT: Listen --

8 MR. LENNON: The six hundred that he's talking about
9 are people that wrote checks payable to the Wall Street Journal
10 and sent back the solicitation remittance to Orbital. That's
11 not a -- that's not a forged endorsement.

12 THE COURT: You don't want to do business with Mr.
13 Chenkin's client.

14 MR. LENNON: Well, --

15 THE COURT: Mr. Chenkin's client doesn't want to do
16 business with you. So I'm going to direct the return of the
17 money. It's only subject to a sufficient amount of security.
18 Now, my recollection in your TRO papers, which I did not sign,
19 Mr. Lennon, because you hadn't given notice to your attorney --
20 the attorneys on the other side, which you have to do, but --
21 Marlon, do you have the order to show cause? Do you have the
22 order --

23 MR. LENNON: Your Honor, for the record, --

24 THE COURT: Yeah.

25 MR. LENNON: -- I gave notice to the bank. They

1 didn't have counsel --

2 THE COURT: Yeah, I understand.

3 MR. LENNON: -- and they wouldn't tell me who their
4 lawyer was.

5 THE COURT: Yeah, I understand.

6 MR. LENNON: And as for this --

7 THE COURT: Just bear with me. Okay, you're willing
8 to post a bond. How much is the bond you're willing to post?

9 MR. LENNON: Your Honor, it should be a de minimis
10 amount. I mean, even --

11 THE COURT: Okay.

12 MR. LENNON: -- ten thousand dollars.

13 THE COURT: No. It should be about ten percent of
14 the -- ten percent of the amount that you're seeking returned.
15 That's four hundred thousand dollars. You post a bond of forty
16 thousand dollars, and I'll direct that Bank of America return
17 the -- return the funds by Friday the 13th.

18 MR. LENNON: Thank you, Your Honor.

19 MR. CHENKIN: Your Honor, maybe I --

20 THE COURT: Mr. Chenkin?

21 MR. CHENKIN: May I be heard on that for a moment?

22 THE COURT: Yes.

23 MR. CHENKIN: With all due respect, if that's the
24 amount that Your Honor is requesting, --

25 THE COURT: It's ten percent.

1 MR. CHENKIN: That's fine.

2 THE COURT: That ought to be adequate in light of
3 what happened.

4 MR. CHENKIN: The -- my concern, though, Judge, is
5 that the returns that are potentially going to come back are
6 going to dwarf that amount. And if the bank --

7 THE COURT: I know that's your concern. But if your
8 concern is that -- if that's the -- and I know it's not your
9 concern but it's the bank's concern.

10 MR. CHENKIN: Yes.

11 THE COURT: You're representing your client. But the
12 client has an obligation here as well, and it should have told
13 Orbital a long time ago. I mean, it just can't stick its head
14 in the sand. You know, Mr. Lennon's papers are convincing in
15 terms of the bank's ignoring any kind of disclosure obligation.
16 I thought maybe the government was trying to seize these
17 materials, the bank -- the proceeds. But it's not. It's just
18 the bank who's conducting its own investigation. They don't
19 give an explanation. I've never heard of that.

20 MR. CHENKIN: With all due respect, Your Honor, it --
21 the account agreement, the contractual agreement, from --
22 between the parties allows the bank to do that.

23 THE COURT: Okay. Well, I'm going to enter my order,
24 Mr. Chenkin, and Mr. Lennon will prepare the order, serve it on
25 you. Make sure you have no objection, and -- other than the

1 ones you've already voiced, --

2 MR. LENNON: Your Honor, --

3 THE COURT: -- and it's to preserve, and I'm going to
4 direct you by Friday the 13th, the close of business on the
5 13th, to return the amount on deposit now in -- from Orbital
6 that's now on deposit with Bank of America, and subject to
7 Orbital Publishing posting a bond in the amount of forty
8 thousand dollars, such bond being against the costs and
9 exposure that you may have because of the reasons that you
10 cite.

11 Yes, Mr. Lennon?

12 MR. LENNON: Your Honor, as an alternative, so that
13 we don't have to go to the expense of posting the bond, if Bank
14 of America would take forty thousand dollars of the proceeds
15 and they could pay that to the clerk of the court, would that
16 satisfy the security requirement? It would be the same thing.

17 THE COURT: Mr. Chenkin?

18 MR. CHENKIN: I don't think I have a problem with
19 that.

20 (Off the record discussion)

21 MR. CHENKIN: That would be acceptable, Your Honor,
22 if we could arrange for an order to have the bank pay it into
23 the court.

24 THE COURT: Well, you negotiate that with Mr. Lennon,
25 and --

1 MR. CHENKIN: That's --

2 THE COURT: -- you submit the order on notice.

3 MR. CHENKIN: That's correct. And in connection with
4 my negotiation with Mr. Lennon, I want to bring up one last
5 point, please. The account, although it's closed, is still
6 getting returns daily. And the procedure that the bank goes
7 through is it honors those returns and reduces the amount in
8 the account, as is banking practice.

9 THE COURT: Any pending items that you have you
10 should process in the normal course --

11 MR. CHENKIN: Process, and --

12 THE COURT: -- in the normal course of business.

13 MR. CHENKIN: Up until the day that we return the
14 funds.

15 THE COURT: Till the close of business on Friday.

16 MR. CHENKIN: Close of business. That's what I
17 wanted to make clear.

18 THE COURT: Yeah. Yes.

19 MR. CHENKIN: Thank you very much.

20 THE COURT: Process anything that you have. And
21 you're free to do that. And then you'll do a true-up with Mr.
22 Lennon as of the close of business on Friday.

23 MR. CHENKIN: Very good.

24 THE COURT: Okay.

25 MR. CHENKIN: Thank you, Your Honor.

1 THE COURT: Anything else?

2 MR. LENNON: Thank you, Your Honor.

3 THE COURT: Thanks very much.

4 * * * *